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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 400

INTERSTATE COMMERCE COMMISSION, THE PENNSYLVANIA RAILROAD COMPANY, THE VIRGINIAN RAILWAY COMPANY, SOUTHERN RAILWAY COMPANY, ATLANTIC COAST LINE RAILWAY COMPANY, SEABOARD AIR LINE RAILROAD COMPANY, and NORFOLK SOUTHERN RAILWAY COMPANY, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The report of Divison 2 of the Interstate Commerce Commission (R. 8-24) is reported at 263 I.C.C. 303. The report of the Commission on re-

consideration (R. 24-40) is reported at 264 I.C.C. 683. The report of the Commission on reargument (R. 41-56) is reported at 269 I.C.C. 141. The opinion of the District Court for the District of Columbia (R. 83-91) is reported at 92 F. Supp. 998. The opinion of the Court of Appeals (R. 770-800) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered July 18, 1952 (R. 801). The petition for a writ of certiorari was filed October 16, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the Interstate Commerce Commission, which dismissed the respondent's claim for reparations, had—

(1) entered findings which lack substantial supporting evidence;

(2) failed to make an adequate determination of material issues of fact and law;

(3) drawn unwarranted inferences from its findings; and

(4) ignored relevant factors of legal significance in reaching its conclusions.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the appendix to the petition.

STATEMENT

Nature of the Proceedings

In 1944, the United States filed with the Interstate Commerce Commission a complaint against seven railroads (R. 93-101).[1] It charged that the carriers had exacted pay for unperformed services in connection with the movement of Army wartime freight sent overseas via the port of embarkation located at Norfolk, Virginia, and that its practices in this respect were unjust, unreasonable and discriminatory, in violation of the Interstate Commerce Act. After hearing, an examiner recommended dismissal of the complaint. Division 2 of the Commission held, however, that the Government was entitled to reparations (one commissioner dissenting). On reconsideration, the full Commission reversed Division 2 and ordered the complaint dismissed (four commissoners dissenting). On reargument, the Commission reaffirmed this decision (five commissioners dissenting).

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[1] During the pendency of the proceedings before the Commission, one of the principal defendants, the Norfolk and Western Railway Company, settled the Government's claim against it for $865,000 (R. 37, 668, 718). That carrier, therefore, is no longer an interested party.

The United States thereupon filed suit in the District Court for the District of Columbia to set aside the Commission's order, naming the United States and the Interstate Commerce Commission as defendants (R. 1-7). The petitioning railroads intervened. A three-judge district court dismissed the complaint on the ground that the United States could not maintain a suit in which it was a necessary statutory defendant (78 F. Supp. 580). On appeal, this Court held that the Commission's order was judicially reviewable at the instance of the United States, and that on remand the case should be heard by a single district judge, with right of appeal to the Court of Appeals (337 U.S. 426).

On remand, the district court sustained the Commission's order. The Court of Appeals (one judge dissenting) reversed, holding that critical findings of the Commission were not adequately supported by the evidence, that the Commission had obviously failed to consider important evidence contradictory to its findings, and that its decision reflected a failure to consider the effect and incidence of certain well-established principles of law. The court accordingly remanded the case to the Commission for further proceedings consistent with its opinion.

The Facts

Since the issues of this case are deeply rooted in the facts, it is necessary to set forth at some length the background of the controversy.

For more than fifty years, it has been the general practice of railroads serving North Atlantic ports, including Norfolk, Virginia, to provide the facilities and services needed to interchange freight between railroad cars and water carriers (R. 10, 239-240, 262-3). With exceptions not here material, the railroads have provided, either directly or through terminal operators, the pier facilities (commonly known as wharfage) and the labor and equipment required to move freight between railroad cars and boat lines (commonly known as handling services). *Ibid.*

In doing so, the railroads have not made a segregated charge for the port services, but have published an overall or single-factor export rate covering delivery to the ship's side. In 1921, a proceeding was instituted to determine whether the Commission should exercise its powers under Section 6 of the Interstate Commerce Act to require the carriers to segregate charges for these services from the line-haul charges. See *Charges for Wharfage, Handling, Storage, and Other Accessorial Services at Atlantic and Gulf Ports,* 157 I.C.C. 663. The Secretary of War (who was charged with the duty of promoting the development of port facilities), the owners of numerous

private and municipal piers, and various groups of shippers were among those who objected to the prevailing practice of the carriers, a practice which naturally tended to "reserve traffic to [the carriers'] own rails and facilities" (157 I.C.C. at 689). The objection was stated in the Commission's opinion as follows (*id.*, p. 686):

> The rail carriers at North Atlantic ports select the rail-water facilities that are to be used in connection with the ship-side rates, and should a shipper insist upon the use of facilities other than those selected by those carriers, he would be required to pay once for the port services in the established ship-side rate, and again for the services performed by the municipal or private facility.

By a 6-5 decision, the Commission permitted continuation of the railroads' practice. It did so, at the behest of the carriers, on specific findings that the facilities which they provided had been shown to be reasonably adequate (p. 692), that there was no substantial evidence "to show injury wrought by the long-existing practice of publishing single-factor rates to cover the entire transportation service from point of origin of the freight to ship side" (p. 686), and that the record was "insufficient to establish that the charges on the traffic * * * are so low as to impose a burden upon other traffic" (p. 692). Down to the present time, the railroads have continued to charge a single-factor

rate and to provide the accessorial services at North Atlantic ports.

Among the piers used by the railroads at Norfolk were the facilities known as Army Base piers 1 and 2 (R. 12). The Base piers, which are the largest and best equipped at the Port (R. 177-8, 182-3), were built by the Government during World War I (R. 12). Shortly after the conclusion of hostilities, however, they were leased to the City of Norfolk which operated them as commercial terminals until 1925 (R. 12). They were then leased successively to the Norfolk Tidewater Terminal Inc. and to the Transport Trading and Terminal Corporation, which also operated them as commercial terminals (R. 12). The latter company was in possession from July 1, 1940 until June 15, 1942, when its lease was cancelled and the Government resumed possession (R. 12).

Railroads serving Norfolk which did not possess their own facilities for providing port services furnished them to their shippers by hiring terminal operators (R. 10). Thus, in 1925, the Pennsylvania Railroad Company contracted with Norfolk Tidewater Terminal Inc., then operating the Army Base piers, agreeing to pay it 20¢ per ton for wharfage and 60¢ per ton for handling services performed in connection with Pennsylvania export and import traffic (R. 266). Subsequently, other railroads made similar arrangements with Norfolk Tidewater (R. 11). The carriers con-

tinued to operate under the same arrangement when the successor lessee of the Army Base piers, Transport Trading and Terminal Corporation, took possession (R. 579).

The tariffs of the Official Territory railroads provided that their rates to Norfolk on export traffic *included* the charges made at designated terminals for wharfage and handling, not to exceed 20¢ and 60¢ per ton, respectively (Ex. 4, R. 416-451). Representative of these tariffs is that of the Virginian Railway Company which reads (Ex. 4, R. 441-2):

> At Lincoln Tidewater Terminals, Inc., Transport Trading and Terminal Corporation or Southgate Terminal Corporation (Portsmouth Division Terminals).
>
> Wharfage, handling and terminal charges, as published in Norfolk and Portsmouth Belt Line Railroad Tariff No. 6-J, I.C.C. No. 105 will be included in the transportation rates applicable to or from Norfolk, Va., on the following traffic moving in connection with the Virginian Railway through the above terminals.[2]

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[2] The Norfolk and Portsmouth Belt Line Railroad, referred to in the above tariff, is a terminal carrier which receives cars from line-haul carriers and moves them to the piers. It is owned by eight line-haul carriers which it serves. It publishes in its tariff charges of 1¢ per 100 pounds for wharfage (*i.e.*, 20¢ per ton) and 3¢ per 100 pounds for handling (*i.e.*, 60¢ per ton) (R. 448).

The other individual lines which serve Norfolk provided in their tariffs either that the rates cover wharfage and handling services at Norfolk (but not to exceed 20¢ per ton and 60¢ per ton, respectively), or that the carrier will provide those services without additional expense to the shipper (Ex. 4, R. 416-451).

By virtue of competitive conditions existing between ports, export rates on shipments to Norfolk are lower than domestic rates to Norfolk (R. 46; Ex. 8, R. 471-7). The carriers protect themselves against abuse by providing generally in their tariffs that the export rates apply only to traffic that does not leave the possession of the railroads or its agents until delivered to the water carrier (Ex. 3, R. 362-406, *e.g.* at 367-8). The tariffs, however, contain a specific modification of the requirement of continued railroad possession where satisfactory proof of exportation is given. They provide that export rates shall apply "also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which export rates apply which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given" (Ex. 3, *e.g.* at R. 367-8). Moreover, during the war, there was incorporated in the tariffs the further provision (*Ibid.*):

> Export rates will also apply on shipments consigned on bills of lading for export,

> destined to foreign countries or foreign possessions of the United States, handled through United States Navy Yards, Naval Bases or Army Bases or delivered to United States Government vessels docked thereat on presentation of proper evidence of exportation.

In 1942, a war year, the United States became the principal shipper over the Army Base piers (R. 12, 105-6). Owing to the greatly increased volume of traffic and the emergency conditions prevailing, the Government deemed it necessary, in the public interest, to cancel its lease to the Transport Trading and Terminal Corporation and to assume direction of the operations on its piers with a view to expediting the movement of outbound military freight (R. 26, 116).[3] The Army thereafter performed the function which previously had been the business of its lessee (R. 108). The character of the change was summarized in the Report of Division 2 as follows (R. 15):

> The handling of the freight between cars and pier floor prior to June 15, 1942, was performed by the pier operator with civilian labor. On that date the Army took over the

[3] Prior to the war, half of the Norfolk traffic moved over the base piers (R. 774). During the war, these piers handled a quantity of traffic almost twice as great as the combined capacity of the other piers at the port (R. 13, 31-32, 182-191).

piers, but there was no change in this loading and unloading operation. The Army, utilizing the existing organization, performed the service with the same civilian employees, under the same supervisory force, and did the work, at its own expense and in the same manner as the terminal operator. Gradually, as additional labor to handle the greater volume was required, troops were used to assist in the unloading operations. At the time of the hearing, they represented about one-half of the total force employed for that purpose. If the Army had not taken its property, the terminal company, with proper organization, could have continued the operation.

After June 15, 1942, the Army Base piers continued to be open to ordinary commercial freight, subject, of course, to military priorities (R. 107). Between 1942 and 1944 the Army handled 700 carloads of commercial freight for which it received no payment from the railroads (R. 122-3). The carriers, however, made no alteration in their rates either with respect to military or commercial traffic (Ex. 3, R. 362-406).

Shortly after taking over the piers, the Army addressed several written requests to the railroads requesting that they make an allowance to the Government equivalent to what had been previously paid the Government's lessee (R. 16, 110,

331 *et seq.*). The carriers refused, stating as their sole ground that the piers were, in effect "private" piers and that wharfage and handling were not customarily furnished at such piers (R. 17, 341, 343 *et seq.*). On May 22, 1943, the Government made written requests of all railroads serving Norfolk to perform the handling services to the extent that those services had for many years been included in the line-haul rates (R. 344). For this purpose, the Government also offered to let the railroads take over its civilian force (R. 28) and to supplement this force, whenever it proved inadequate, with troops (R. 16, 111). These offers were subject only to the condition that the carriers observe security, fire, safety and sanitary rules (R. 16, 110). The carriers declined to perform the service (R. 354-5).

The United States subsequently filed its complaint seeking 80¢ per ton reparations, on the ground that the carriers had collected rates covering pier services but had failed to perform or to pay for them.

Decision of the Court of Appeals

The Commission had held that, as a pure matter of verbiage, the regular tariff provisions relating to the performance of wharfage and handling services became inapplicable after the Army resumed possession of its piers. It had stated its position as follows (R. 43):

> The reference in the tariffs in some instances was to the "terminals" and in other instances to the "facilities" of the Transport Trading and Terminal Corporation, but no mention was made in those tariffs to Army Base Piers 1 and 2 by that name. In order to sustain the complainant's contention, therefore, it would be necessary to read into the tariffs words which were not there.

The Court of Appeals pointed out (R. 781) that the language of the provision is apparently designed to describe a geographical location, since it states that the cost of the services is covered when the traffic is handled "at" Tranport Trading and Terminal Corporation or "through" the terminal (see *supra,* p. 8). Accordingly, the court held, a change in proprietorship of the piers (or terminal) does not make the tariff provision meaningless. The court also noted that the Commission had failed to consider the evidence that the carriers, themselves, had interpreted the tariffs in this way on previous occasions when the proprietorship of the piers had been changed (R. 780-1). And it found no indication in the Commission's report that it had considered the familiar precepts that ambiguities in a tariff should be construed against the carrier, and that the "construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed" (R. 781).

The Commission had also held that while it was clear from the wartime provision included in the tariffs (*supra*, pp. 9-10) that export rates applied to shipments moving through Army bases on their way overseas, there was no implication in this provision that the carriers would perform (or pay for) the unloading job at the piers. The Court of Appeals held (R. 784):

> * * * this provision in terms made the rates contained in the export tariff schedules applicable to the Government shipments passing through Army Base Piers Nos. 1 and 2. A rate is by definition an announcement that stated services will be accorded for a stated charge. Thus on the face of the tariff the Government was entitled to any and all ancillary services or facilities which, by the tariffs, were included under the rates: the Government was to receive no less than a private shipper would receive on commercial export freight. The record contains no support for the conclusion that, simply because these shipments received the export rates by virtue of the special tariff provision, they were not entitled to receive all the services ordinarily covered by those rates.

The Commission had held further that, if there was an obligation to provide the accessorial services, it was discharged. It found that the conditions

prevailing at the port—the tremendous volume of traffic, the need for prompt and coordinated service in feeding freight to the Army's waiting convoys, the civilian labor shortage which made it necessary at times to secure added manpower from the military—made it "impractical" for the carriers to provide the service "at their convenience" (R. 785-8). It relied on the rule established in *Ex Parte 104, Propriety of Operating Practices—Terminal Services*, 209 I.C.C. 11, as support for its conclusion that when the Army entered the picture by taking over the operation of its piers the carriers' duty to provide terminal services was at an end.

The Court of Appeals concluded from its study of the record that there was little support for the finding that carrier performance would have been "impractical" (R. 786-8) and that there was substantial support for Division 2's finding to the contrary (R. 791-2). It noted that the carriers first refused to pay the Army for its performance, and that later, when they were requested to perform the job themselves, they refused again, giving as their only reason that they did not consider that the tariffs obligated them to undertake it (R. 343-4). The carriers' own statements, the court found, indicated that, from first to last, they were completely unwilling either to pay for the service or to attempt its performance. The court also noted the unchallenged finding of Division 2 that, at the two other major piers at the port of

embarkation in Norfolk, handling service was performed throughout the war by civilian contractors with the use of both civilian and military personnel. The court recognized that war conditions inevitably imposed strains, but it found that there was no evidentiary basis for concluding that the carriers could not have performed the job at the piers by fair and honest effort. It stated that the burdens there were "light indeed by comparison" to the hardships under which other segments of the American economy were simultaneously laboring. And it found that the Commission had failed to give consideration or effect to Section 6 (8) of the Interstate Commerce Act which directs the carriers to "adopt every means within their control to facilitate and expedite the military traffic" in time of war.

The court also concluded that the Commission had plainly erred in regarding the principle of the *Ex Parte 104* cases as relevant. The principle there involved, the court held, is that carriers may not render gratuitous services, *i.e.*, services not covered by their charges, to particular favored industrial shippers, whereas the issue in the present case is whether the carriers have failed to provide pier services to the Government which are covered by the shipside rates charged and are provided to other shippers to whom such rates apply.

The court further pointed out that the Commission had assumed that a finding that performance by the carriers was "impractical" was auto-

matically dispositive of the Government's case. The court was not persuaded that this legal conclusion was sound (see R. 789-792). It recognized that a shipper may, in certain circumstances, waive or forfeit his right to carrier performance of one of its obligations, for example, by refusing to accept an adequate tender of service or by impeding the carrier's performance. It held, however, that the Commission had neglected its function when it failed to consider and weigh the particular circumstances affecting the case before it. Among the relevant factors which the Commission should have considered, the court noted the following: the railroads had no piers capable of handling more than a small fraction of the traffic; the Government's operation of its piers was undertaken in an emergency and for the purpose of assuring a continuous flow of war materiel; Government operation, in lieu of operation by the Army's lessee, did not inconvenience the railroads in any way, but had the practical effect of augmenting the facilities and personnel available for the movement of unprecedented volumes of traffic; if private operation had continued, the Army could still have controlled the scheduling of shipments and like matters by the use of military priorities and routings; the carriers were under a statutory duty to expedite military traffic; the carriers plainly indicated unwillingness to attempt to perform the job at the only piers where

the traffic could have been handled; the carriers are seeking "the retention of money which they would have been obliged to disburse to the Terminal Corporation, had the war not led the Army to assume operation of the piers" (R. 790).

The Commission had held that the railroads' practices did not work an unlawful discrimination against Army shipments. It based this conclusion on the fact that it had held in other cases that it is reasonable for a carrier to provide service at a public pier of its own selection, while refusing to do so at a private pier of the shipper's selection. In this connection, it cited *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I.C.C. 463 (R. 33-34, 43). It also stated, without indicating its view of the legal significance of the statement, that the export rates were below reasonable maxima and that to require the payment of reparations in this case would make them "just that much below the upper limit of reasonableness" (R. 49).

The Court of Appeals did not hold "that as a general rule some form of distinction between public and private facilities would be legally unsound" (R. 793). It pointed out, however, that the precedent upon which the Commission relied did not justify the conclusion that the distinction was appropriate in the present case. Holding that the Commission had failed to determine whether there was a sound basis for a distinction on the facts of record, it stated (R. 794-5):

> It is not incumbent upon this court to decide in the first instance whether any such basis exists, and we make no ruling on the legality of the discrimination.

The court held further (R. 796) that "It would appear entirely inconsistent with the statutory scheme to require that before a shipper can recover reparation for any breach of a railroad's duty he must show that the total amount he paid was in excess of reasonable maximum rates. Sections 8, 9 and 16(1) on their face provide damages for violations of each of the statutory prohibitions. The effect of these remedial provisions would be vitiated if a shipper could not recover by showing a departure from published rates (Section 6(7)), or an illegal discrimination (Section 2), rebate (Section 2), or preference (Section 3), but had in each case to prove also a breach of the duty to charge no more than reasonable rates (Section 1)."[4]

ARGUMENT

This case involves the right of a single shipper (the United States) to obtain reparations from certain carriers on the basis of particular acts and practices, no longer pursued, which took place in a single locality and which affected the rights of

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[4] The Court did not question the Commission's finding that the rates were below reasonable maxima (see R. 796-8). The statement to the contrary in petitioners' Specification No. 10 (Pet., p. 11) is incorrect.

no other shipper. It requires a determination of the legal consequences to be attributed to a complex of facts which is indisputably unique. Petitioners fail to demonstrate that the decision of the Court of Appeals raises questions of general importance. There is no conflict with the decision of any other court.

Beyond this, it is plain that the controversy has not yet been fully determined. The order of the Commission dismissing the Government's complaint has been set aside, but the matter has been remanded to the Commission for further proceedings. As the court's opinion indicates (R. 799-800), the Commission is to make further findings, to reexamine various questions, and to consider factors which it previously failed to take into account. It is then to make a complete statement of the reasons for such conclusions as it may draw. If an award should ultimately be made to the United States, the petitioning railroads will have full opportunity at that time to secure further judicial review. *United States* v. *United States Smelting Co.*, 339 U.S. 186, 198.

Clearly, this Court should not be called upon to rule on the case in its present posture. After thorough consideration of the record, the Court of Appeals wrote an exhaustive opinion in which it fully explained its reasons for concluding that there were serious deficiencies in the Commission's reports. It found that critical findings lacked evidentiary support, that the Commission had

failed in certain instances to take into account evidence contradictory to its findings, and that the Commission, in reaching its conclusions, had applied certain rules and precedents in ritualistic fashion, ignoring distinguishing factors which made them either inapplicable or of highly dubious relevance. On certain issues which the Commission completely failed to meet or to resolve, the court refrained from decision so that the Commission would have an opportunity to pass upon them in the first instance. Since the case is not ripe for decision, the petition, for that reason alone, should be denied. Cf. *Hanover Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-9; *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384.

Petitioners contend in substance that the court erred in concluding (1) that certain Commission findings were not adequately supported and (2) that certain inferences which the Commission drew from its findings were unwarranted, because they failed to take all relevant factors and principles of law into account. With the exceptions indicated below, it is not claimed that the alleged errors involve questions which affect railroad practices generally. As to the correctness of holdings which admittedly have no significance beyond the facts of this case, we rely, without further discussion, upon the reasons carefully set forth in the opinion of the Court of Appeals (summarized *supra*), an opinion which we believe to

be sound in all particulars and to conform to the highest standards of judicial review.

Petitioners state (Pet., p. 13) that in some respects "the opinion affects railroad practices generally". It is specifically claimed that (*ibid.*):

> The holdings of the court below on the propriety and legality of terminal practices and on the question of discrimination are inconsistent with principles that the Commission has developed and consistently applied over the years in dealing with these technical and complex transportation questions.

It is submitted that the court's holdings relating to these matters are correct, that they are nowise inconsistent with prior Commission decisions, and that they are in accord with established principles of law.

1. It is claimed by petitioners (Pet., pp. 23-25) that the Court of Appeals failed to give proper effect to the principles established in *Ex Parte 104, Propriety of Operating Practices—Terminal Services,* 209 I.C.C. 11. The *Ex Parte 104* investigation dealt with the spotting of cars on industrial sidings. The Commission concluded—and in subsequent cases this Court has affirmed the holding—that the applicable domestic line-haul rates covered "delivery to the industries' interchange tracks" but "that spotting within [industrial] plants is not included in the service for

which the line-haul rates were fixed * * *", *United States* v. *American Tin Plate Co.*, 301 U.S. 402, 408. See, also, *United States* v. *Wabash R. Co.*, 321 U.S. 403, and *United States* v. *U.S. Smelting Co.*, 339 U.S. 186. It was held further that if a particular industry received service beyond that covered by the rates, it was required to pay a commensurate charge, and that any other course would result in discrimination between industrial plants (*ibid.*). The carriers would infer, in the instant case, that when they delivered to the yards adjoining the base piers, their obligation was terminated.

But the fact that domestic rates charged industrial shippers do not cover service within industrial plants cannot alter the fact that export rates at North Atlantic ports *do* explicitly cover unloading services at piers.[5] No one knows this

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[5] See the tariff provisions, *supra*, pp. 8-10. Petitioners have attempted to shroud the fact that the rates cover the services (see Pet., p. 14) by pointing out (1) that the export rates are below reasonable maxima, (2) that they are not higher than domestic rates under which no comparable services are provided, and (3) that the shipper pays an overall rate and does not pay a segregated charge for wharfage and handling as such.

But neither the reasonableness of the overall rate, nor the fact that domestic rates provide for less service (a circumstances explained by the fact that if export rates were raised or service thereunder decreased, the traffic would go to competitive ports, R. 36, 46, see *Albany Port District Commission* v. *Ahnapee & Western Ry. Co.*, 219 I.C.C. 151, 163-5), alters the fact that the railroads have undertaken to bear the cost

better than the carriers, who successfully fought, over the opposition of shippers, for the privilege of publishing a single-factor shipside rate. See *Charges for Wharfage, Handling, Storage, and other Accessorial Services at Atlantic and Gulf Ports,* discussed *supra,* pp. 5-6. In the Commission's words, railroads operating under shipside rates assume "the obligation of performing at the port of interchange all services necessary to effect the delivery of freight to a boat line," *Handling Freight Between Ships and Cars at Ports,* 253 I.C.C. 371, 373. As Commissioner Splawn (dissenting) stated (R. 53-54) in referring to *Ex Parte 104,* "If the principles announced in that proceeding were applicable at Norfolk when the Army operated its piers, they were and are equally applicable at Norfolk, when the Army piers were and are operated by a private corporation, and at

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(within defined limits) of pier service at North Atlantic ports. And the fact that the shipper pays a single-factor rate for all service from point of origin to shipside does not mean that individual items of service are not fully covered by the rate. It has never been suggested or claimed that the export or shipside rates on traffic to Norfolk are less than compensatory.

The dollars and cents aspect of this case is not at all mysterious. The export rates to Norfolk cover service to shipside. Until June 1942, 80 cents per ton, derived exclusively from the rates paid by the shipper, was paid to terminal operators at Norfolk who performed the pier service. After June 1942 and until 1946, during which period the Army performed the identical service previously undertaken by its lessee, the carriers continued to collect the same rates, but no longer made any 80 cents per ton disbursements. All but one carrier involved has retained the added increments.

all other ports, but neither the majority report nor defendants suggest that such services and absorptions be discontinued." The Commissioner also stated (R. 39):

> * * * it is apparent that the principles which underlie the findings in the so-called terminal allowance cases, invoked to support the report, are not in point here. The terminal carrier, the Belt Line, continued to perform spotting of the cars, switching them to and from the unloading points on the piers just as it long had been doing. Complainant unloaded them, for which service it seeks compensation. But no issue as to an allowance for the spotting is here presented. All that is involved is the failure of the port lines to provide the same full service to which complainant was entitled under the shipside rates as defendants contemporaneously accorded shippers at other ports and at other public pier facilities at the port of Norfolk.

In short, this case does not involve a question as to where line-haul transportation begins and ends. It involves the question—Was there any legal excuse for the carriers' failure to perform (or pay for) certain services which they specifically undertook to provide and which are covered by the rates which they collected? The principle of the industrial terminal cases is relevant to this

extent and to this extent only: A corollary of the proposition that shippers are not entitled to services beyond those included in the rates is the proposition that carriers may not refuse to render those services which are included.

2. Petitioners argue (Pet., p. 26 *et seq.*) that the Court of Appeals has, in effect, rejected a distinction adopted in a number of Commission decisions, a distinction which holds that it may be reasonable for carriers to furnish services at designated public facilities of their own choice, while refraining from performing similar services at facilities selected by the shipper. Actually, the court recognized that in many circumstances a distinction along those lines would be appropriate (R. 793). But it also recognized, quite correctly, that a determination in a particular case whether there has been an unlawful discrimination must be made on the basis of the particular facts and circumstances (R. 795). Reading the Commission's report, the court found that the Commission had not considered and weighed the relevant circumstances, but had simply relied upon one of its prior decisions, *Weyerhaeuser Timber Co.* v. *Pennsylvania R. Co.*, 229 I.C.C. 463. Referring to that decision, the court found that it was "hardly a determinative precedent" (R. 793). It concluded that the ritualistic application of a rule derived from an irrelevant decision did not satisfy the requirements which the Commission must

meet in its performance of a quasi-judicial function. The court refrained from ruling on the issue of discrimination so that, on remand, the Commission might weigh the facts in the first instance (R. 794).

It is revealing to consider the *Weyerhaeuser Timber Co.* decision, a decision which Division 2 of the Commission regarded as having "little, if any, resemblance" (R. 20) to the case at bar. In that case, the defendants, a number of railroads, had held themselves out to perform port services at designated public piers (*i.e.*, piers in the nature of public utilities) owned by the City of Newark. These piers were ample "to accommodate business offered" (229 I.C.C. at 466). The complainant, a timber company, demanded, however, that the railroads perform the port services at certain other piers in the vicinity, piers owned and used by its wholly-owned subsidiary, the Weyerhaeuser Steamship Company. To reach the Weyerhaeuser piers, it would have been necessary for defendants to operate over the tracks of a third party. That, in turn, would have subjected them to a charge of 50 cents per ton of traffic moved. On the basis of that dissimilarity between the city piers and the Weyerhaeuser piers, the Commission concluded (*id.*, pp. 476-7) that the refusal of the defendant carriers was not "unreasonable, unjustly discriminatory or unduly prejudicial".

The *Weyerhaeuser* case, as well as the other port service cases which petitioners cite (Pet., p.

13), involved situations where shippers sought services (or allowances) at piers other than railroad-designated facilities, although the railroad's facilities were wholly adequate for the performance of the job and performance elsewhere, for one reason or another, would have been an added burden to the carriers.

Here, the piers involved are those which the carriers have always served. They are also the best equipped facilities at the port and the only facilities at which the wartime traffic could have been handled. The record shows that the combined capacities of all other piers in Norfolk would have been equal to handling only 37 percent of the military traffic shipped through that port, not to mention the purely commercial traffic (R. 13, 39). Since the carriers serving Norfolk were enabled to engage in this extensive and by no means unprofitable business only by virtue of the availability of the Army Base piers, it would seem too plain for argument that the railroads were not burdened or inconvenienced by serving those piers at Norfolk, as distinguished from other piers at the harbor.[6] What justification can there be then—

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[6] The court also noted that, during the period of Army operation, the Base piers handled commercial traffic to the extent that military priorities permitted. It accordingly stated that the piers were not "private" in the normal sense of the term (R. 794). Commissioner Splawn had commented in this connection (R. 38):

(1) For paying the terminal operators at other Norfolk piers the sum of 80 cents per ton, while refusing to perform or pay for port services at the Army Base piers?

(2) For extending to all commercial shippers sending export traffic through Norfolk (including those whose traffic was handled at the Base piers) 80 cents' worth of services per ton, while refusing to make available to the Army, paying the same export rates, either the services or allowances?

We believe that there is none, and that it is plain, so far as Army shipments are concerned, that the carriers have illegally "collected and retained compensation for services which they did not perform" (dissenting opinion of Commissioner Alldredge, R. 40). In holding that the Commission should fully examine all of the factors bearing on this issue, the Court of Appeals was plainly correct.

"Complainant's piers were operated for many years as public piers and, as the record shows, they have been continued in operation as such, commercial tonnage being handled thereover to the extent that use of the piers by the Government, for handling military traffic incident to the war, would permit. The defense of the port lines resting, as it does, on the attempt to distinguish complainant's pier facilities as private piers, lacks force."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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